

NOV - 8 1999

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP MARION MOORE

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)
) **NOT FOR PUBLICATION**
)

) **Case No. F-98-647**
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SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Phillip Marion Moore, was tried by jury in Tulsa County District Court Case No. CF-97-2113 and convicted of: Manufacturing a Controlled Dangerous Substance, after former felony conviction, in violation of 63 O.S.Supp.1996, § 2-401(F)(Count I); Unlawful Possession of Paraphernalia in violation of 63 O.S.1991, § 2-405 (Count II); Possession of Explosives, after former felony conviction, in violation of 21 O.S.1991, § § 1767.1(A)(4) (Count III); Possession of a Controlled Drug, after former felony conviction, in violation of 63 O.S.1991, § 2-402 (Count IV); and Unlawful Possession of a Firearm While in Commission of a Felony, after former felony conviction, in violation of 21 O.S.1991, § 1287 (Count V). The jury recommended sentences of fifty (50) years imprisonment and a \$50,000.00 fine for Count I, one (1) year imprisonment for Count II, twenty-five (25) years imprisonment and a \$10,000.00 fine for Count III, ten (10) years imprisonment for Count IV, and ten (10) years imprisonment and a \$5,000.00 fine on Count V.¹ The trial judge

¹ In reviewing the judgments and sentences in this case, along with the jury forms and the sentencing proceeding, the Court notes that the judgments and sentences have numerous scrivener's errors. Appellant's conviction on Count I, Manufacturing a Controlled Dangerous Substance, states that it was in violation of 63 O.S. § 2-401(E). Because the crime occurred in April, 1997, the crime was a violation of 63 O.S.Supp.1996, § 2-401(F). Count II, Unlawful

sentenced Appellant accordingly and ordered the sentences on all five counts to run consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

- I. Appellant's convictions for both manufacturing and possessing methamphetamine violate the prohibitions against double jeopardy and double punishment;
- II. Appellant was deprived of due process and exposed to excessive punishment, when the trial court instructed on a crime not charged;
- III. The evidence was insufficient to support a conviction for possession of explosives because there was no proof of the requisite intent to illegally use the explosive;
- IV. The conviction for possession of a weapon while committing a felony should be vacated and dismissed because the statute Appellant was charged with violating does not apply to the facts of this case; and
- V. Inadmissible hearsay denied Appellant a fair trial;
- VI. The prosecutor deprived Appellant of a fair trial during second stage when he urged the jury to disregard the law regarding the punishment range for the offense of manufacturing methamphetamine; and
- VII. Appellant's conviction for possession of methamphetamine must be reversed because the trial court had sustained the demurrer to the charge, and therefore the conviction violates the prohibitions against double jeopardy.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined neither reversal nor modification is required on Counts I, II, III, or V.

Possession of Paraphernalia, states the conviction was for "UNLAWFUL POSSESSION OF CONTROLLED DRUG/FELONY AFCF" in violation of 63 O.S.1991, § 2-402(B)(1), although it denotes the correct sentence. (O.R. at 153.) Count III, Possession of Explosives, states that Appellant's conviction was based upon "21 1368" rather than 21 O.S.1991, §1767.1(A)(4). Appellant's conviction on Count IV, Possession of a Controlled Drug, states the conviction was a violation of 63 O.S. 2-401(E), which is a statute relating to manufacturing drugs. Further, the Sentencing Data Information Sheet on all five convictions erroneously states the

However, we find reversal is required with respect to Appellant's conviction on Count IV.

With respect to the proposition one, we find Appellant's conviction for both manufacturing methamphetamine and possessing methamphetamine violate the statutory prohibition against double punishment. 21 O.S.1991, § 11; *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995). Appellant's convictions for possession was based upon the same evidence used to convict him of manufacturing, i.e. the methamphetamine and precursor substances gathered from the drug lab. Moreover, the crime of manufacturing cannot be accomplished without the act of possession because possession is required in order to produce, prepare, propagate, compound, or process methamphetamine. See 63 O.S.Supp.1995, § 20101(9)(defining the term "manufacture"); *Barton v. State*, 26 Okl.Cr. 150, 222 P. 1019, 1020 (1924) ("one cannot manufacture whisky illegally without at the same time having illegal possession of it.")

With respect to proposition two, we find the actual wording of the information more closely resembles a violation of 21 O.S.1991, § 1767.1(A)(4) than a violation of 21 O.S.Supp.1995, § 1368. Appellant did not object to the instructions offered by the trial court and even argued the State had failed to prove an element of the crime. We find no due process violation or plain error. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

With respect to proposition three, we find the evidence, when viewed in the light most favorable to the State, rules out every reasonably hypothesis² other than Appellant intended to use the grenade to unlawfully kill, injure, or

convictions were enhanced by a conviction for "POSS C/D."

intimidate a person or to unlawfully damage personal property, i.e. the unlawful methamphetamine lab in his bedroom. 21 O.S.1991, § 1767.1(A)(4); *Miller v. State*, 977 P.2d 1099, 1107 (Okl.Cr.1998). Similarly, in proposition four, we find the totality of the circumstance exclude every reasonable hypothesis except that Appellant possessed the gun while committing the felony of manufacturing a controlled dangerous substance. *Hill v. State*, 898 P.2d 155, 166 (Okl.Cr.1995); *Pebworth v. State*, 855 P.2d 605, 606-07 (Okl.Cr.1993).

With respect to proposition five, we find Appellant was not denied the right to a fair trial or to confront witnesses. The prosecutor asked Carla during redirect if she ever told officers anything different regarding her knowledge of Appellant's manufacturing operation, and Carla stated she did not recall. Carla thus had the opportunity to explain or deny her prior inconsistent statement. Even if it could be said 12 O.S.1991, § 2613(B) was not completely followed, the trial court's admonishment to the jury cured any error that may have occurred. *See Cheatham v. State*, 900 P.2d 414, 425 (Okl.Cr.1995) ("we have long held that when inadmissible evidence or an improper comment is presented to a jury, an admonishment to the jury by the court that the evidence or comment is not to be considered will cure any error.")

With respect to proposition six, we find no error occurred. Appellant's claim of error with respect to proposition seven has been rendered moot by our resolution of proposition one.

² My use of the "reasonable hypothesis test" in this opinion is based upon *stare decisis*.

DECISION

The judgments and sentences on Counts I, II, III and V are hereby **AFFIRMED**. The judgment and sentence on Count IV, Possession of a Controlled Drug are hereby **REVERSED** and **REMANDED** with instructions to **DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JESSE S. HARRIS, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

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